

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	08-CR-01669 JB
)	16-CV-740
RICHARD McKENZIE,)	
)	
Defendant.)	

MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. § 2255

Petitioner, Richard McKenzie, by and through his counsel of record, Jason Bowles of Bowles Law Firm, hereby files a motion to set aside the judgment in this case and correct his sentence pursuant to 28 U.S.C. § 2255.

On September 7, 2012, this Court sentenced Mr. McKenzie to a term of 262 months imprisonment after finding that he was a career offender under U.S.S.G. § 4B1.1. The Court found Mr. McKenzie to be a career offender after adopting the finding of the presentence report that his instant offense was a “crime of violence” and that he had at least two qualifying prior convictions that supported the career offender enhancement. Specifically, the Court found that Mr. McKenzie had a conviction for criminal sale of a controlled substance (felony) and “robbery aided by another” that qualified as a “crime of violence”.

However, in light of the Supreme Court’s recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. McKenzie may no longer be a career offender because his prior conviction for robbery aided by another may no longer qualify as a career offender “crime of violence.”¹

In *Johnson*, the Supreme Court struck down the Armed Career Criminal Act’s (ACCA) residual clause (18 U.S.C. § 924(e)(2)(B)(ii)) as unconstitutionally vague. 135 S. Ct. at 2557. It follows from *Johnson* that the identical residual clause in the career offender provision (U.S.S.G. § 4B1.2(a)(2)) is also void for vagueness. Thus, the only remaining question here is whether Mr. McKenzie’s prior offense for “robbery aided by another” qualifies as a “crime of violence” under the remaining “enumerated offenses” clause or “force” clause of the career offender provision (U.S.S.G. § 4B1.2(a)).

Full briefing is necessary to determine whether Mr. McKenzie has the two necessary predicate convictions (either “crimes of violence” or “controlled substance offenses”) to qualify him as a career offender, and whether, if not, his current sentence violates due process of law in violation of 28 U.S.C. § 2255(a). Mr. McKenzie previously filed a 2255 petition on other grounds, which this Court denied, and which was upheld by

¹ Under the career offender provision, an offense qualifies as a “crime of violence” if it is “punishable by imprisonment for a term exceeding one year” and it

- (1) has an element the use, attempted use, or threatened use of physical force against the person of another; [known as the force clause] or
- (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [known as the enumerated offenses clause], *or otherwise involves conduct that presents a serious potential risk of physical injury to another* [known as the residual clause.]

U.S.S.G. § 4B1.2(a) (emphasis added).

the Tenth Circuit. Thus, this is a successive petition. Counsel has filed a motion in the Tenth Circuit requesting authority for Mr. McKenzie to file this successive petition. That motion is pending.

Mr. McKenzie's petition is timely under 28 U.S.C. § 2255(f)(3) because he filed it within one year of the Supreme Court's decision in *Johnson* – a ruling which established a “newly recognized” right that is “retroactively applicable to cases on collateral review.” Thus, Mr. McKenzie respectfully requests that this Court grant his § 2255 motion, upon approval to file by the Tenth Circuit, permit full briefing, and to vacate his current sentence, and re-sentence him.

Due to time constraints, counsel cannot, at this time, fully brief the issues presented in this petition. Nonetheless, counsel will ask for leave to supplement this petition at a later time.

Respectfully submitted,

/s/ Jason Bowles
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I hereby certify that a true and correct copy
of the foregoing was electronically submitted
this 22nd day of June, 2016 to:

Samuel Hurtado
Assistant United States Attorney

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm